APPENDIX

APPENDIX A – United States Court of Appeals decision to deny relief for Pro Se Motion for Rehearing or Rehearing En Banc (decided 11/14/24) Case No. 22-1013

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of November, two thousand twenty-four.

United States of America,

Appellee,

v.

Steve Rosado,

Defendant - Appellant.

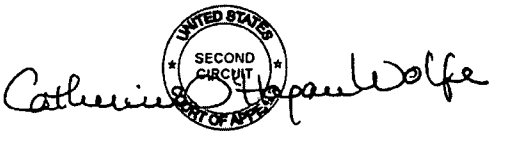
ORDER

Docket No: 22-1013

Appellant, Steve Rosado, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B - United States Court of Appeals published opinion to affirm in parts the conviction and Judgment, on direct appeal (entered 7/30/24) Case No. 22-1013

22-1013
United States of America v. Rosado

In the
United States Court of Appeals
For the Second Circuit

August Term 2023

No. 22-1013-cr

UNITED STATES OF AMERICA,

Appellee,

STEVE ROSADO,

Defendant-Appellant,

Appeal from the United States District Court
for the Southern District of New York
No. 1:21CR00003 (JSR), Jed S. Rakoff, District Judge, Presiding.
(Argued December 15, 2023; Decided July 30, 2024)

Before: PARKER, NATHAN, and MERRIAM *Circuit Judges.*

Defendant-Appellant Steve Rosado appeals from a judgment of the United States District Court for the Southern District of New York (Rakoff, J.). He challenges seven additions to his conditions of supervised release on the ground that they were not orally pronounced at sentencing, but were added only later in the written judgment of conviction. We agree with Rosado that the oral pronouncement of his sentence does not match his subsequent written judgment. The oral pronouncement controls, and so any burdensome punishments or restrictions added in the written judgment should be removed. *See United States*

v. Rosario, 386 F.3d 166, 168 (2d Cir. 2004). Accordingly, we **VACATE** and **REMAND** to the district court to strike the challenged conditions from the written judgment. In a concurrently issued summary order, we affirm the district court's judgment as to other challenges raised *pro se* by Rosado.

MATTHEW B. LARSEN, Assistant Federal Defenders, Appeals Bureau, Federal Defenders of New York, New York, NY *for* Defendant-Appellant

JANE Y. CHONG, Assistant United States Attorney (Jonathan L. Bodansky and Stephen J. Ritchin, Assistant United States Attorneys, on the brief), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY

PER CURIAM:

In November 2021, Steve Rosado pled guilty to attempted enticement of a minor to engage in illegal sexual activity in violation of 18 U.S.C. § 2422(b) and attempted receipt of child pornography after having been convicted of sex offenses involving minors in violation of 18 U.S.C § 2252A. On appeal, he challenges seven additions to his conditions of supervised release on the ground that the district court failed adequately to pronounce them at sentencing but later added them to the written judgment of conviction.

We agree that those additions should have been pronounced at sentencing as required by Federal Rule of Criminal Procedure 43(a) and our precedent. *See, e.g., United States v. Washington*, 904 F.3d 204, 208 (2d Cir. 2018). Accordingly, we

VACATE and REMAND to the district court to enter a modified judgment of conviction removing the seven unpronounced additions.[1]

BACKGROUND

In December 2020, Rosado met with a woman whom he believed to be the mother of two girls, ages 12 and 9. In previous online exchanges with the woman, who was, unbeknownst to him, actually an undercover law enforcement agent, Rosado expressed a desire to engage in sexual conduct with the daughters. As Rosado and the undercover agent headed to her purported apartment, he was arrested. At the time of his arrest, Rosado was a registered sex offender and had two prior convictions for sex offenses involving minors.

Rosado was subsequently charged with (1) attempted enticement of a minor to engage in illegal sexual activity, in violation of 18 U.S.C. § 2422(b) ("Count One"), (2) committing that offense while being required by law to register as a sex offender, in violation of 18 U.S.C. § 2260A ("Count Two"), and (3) attempted receipt of child pornography after having been convicted of sex

[1] Proceeding *pro se*, Rosado raised several other challenges to his convictions that we have rejected in a summary order filed this day.

offenses involving minors, in violation of 18 U.S.C § 2252A(a)(2)(B) and (b)(1) ("Count Three").

Rosado entered into an agreement to plead guilty to Counts One and Three. The district court sentenced Rosado to 240 months' imprisonment, to be served concurrently on both counts, followed by a lifetime term of supervised release. In addition to imposing most of the mandatory and "standard" conditions of supervised release detailed in United States Sentencing Guidelines ("U.S.S.G.") § 5D1.3(a) and (c), the district court announced several other conditions that were specific to Rosado. Of these, Conditions Three, Four, and Six are relevant to this appeal. At sentencing, the district court articulated those conditions as follows:

> **Condition Three**: Rosado "will not have any deliberate contact with any child under 18 years of age unless approved by the probation office[.]"
>
> **Condition Four**: Rosado "will permit the U.S. Probation Office to install any application or software that allows it to survey and/or monitor his computer and similar activity[.]"
>
> **Condition Six**: Rosado "will undergo a sex offense specific evaluation and participate in an outpatient sex offender treatment and/or outpatient mental health treatment program on the standard terms and conditions[.]"

App'x at 32-33. However, in its subsequent written judgment, the district court added multiple requirements to Conditions Three, Four, and Six that had not

been pronounced at sentencing. In his appeal, Rosado challenges the following seven additions:

Condition 3:

- "You must not loiter within 100 feet of places regularly frequented by children under the age of 18, such as schoolyards, playgrounds, and arcades."

- "You must not view and/or access any web profile of users under the age of 18. This includes, but is not limited to, social networking websites, community portals, chat rooms or other online environment (audio/visual/messaging), etc. which allows for real time interaction with other users, without prior approval from your probation officer."

Condition 4:

- "[Y]ou must allow the probation officer to conduct initial and periodic unannounced examinations of any Device(s) that are subject to monitoring."

- "You will not utilize any peer-to-peer and/or file sharing applications without the prior approval of your probation officer."

Condition 6:

- You must "submi[t] to polygraph testing[.]"

- You must "refrain[] from accessing websites, chatrooms, instant messaging, or social networking sites to the extent that the sex offender treatment and/or mental health treatment program determines that such access would be detrimental to your ongoing treatment."

- "You will not view, access, possess, and/or download any pornography involving adults unless approved by the sex-offender specific treatment provider."

App'x at 40.

STANDARD OF REVIEW

"[W]hether the spoken and written terms of a defendant's sentence differ impermissibly" presents a question of law that we review *de novo*. *Washington*, 904 F.3d at 207. We generally review an issue of law for plain error where, as here, the defendant has failed to raise the issue in the district court. "But when the point of law on appeal is a term of the defendant's sentence and the defendant lacked prior notice in the district court that the term would be imposed, we will review the issue *de novo* even if the defendant failed to raise an objection in the district court." *Id.*

DISCUSSION

I. The Unpronounced Additions to Conditions Three, Four, and Six

Federal Rule of Criminal Procedure 43(a)(3) requires that a defendant be present at sentencing. *See United States v. Sims*, 92 F.4th 115, 125 (2d Cir. 2024). We have interpreted that rule to require that the sentencing court orally pronounce special conditions of supervised release in open court. *Id.* We have

been clear "that in the event of variation between an oral pronouncement of sentence and a subsequent written judgment, the oral pronouncement controls, and any burdensome punishments or restrictions added in the written judgment must be removed." *United States v. Rosario*, 386 F.3d 166, 168 (2d Cir. 2004) (citations omitted); *see also Sims*, 92 F.4th at 125 ("[W]hen there is a conflict between the court's unambiguous oral pronouncement of a special condition and the written judgment, the oral pronouncement controls.").

Our review of the record yields no indication that the district court pronounced at sentencing or otherwise provided adequate notice that the seven additional requirements would be imposed. The government contends that the additions were included in the Presentence Report ("PSR") and that the district court, accordingly, had adopted the PSR's proposed conditions into its sentence. According to the government, the district court "paraphrased the first sentences of these special conditions as they had been described" in the PSR. Appellee's Br. 30. But that is not sufficient. If it were, a defendant would leave his sentencing without the requisite certainty as to which portions of the PSR's proposed conditions were imposed and would be left guessing until he obtained

a copy of the subsequent written judgment.[2] That lack of clarity is exactly what Rule 43(a)(3) is intended to guard against. Sentencing must occur in open court in the defendant's presence. This requirement affords a defendant and his counsel an opportunity to obtain a clear understanding of the terms of the sentence and to object to or seek clarification of its components.

Although we have identified certain circumstances in which conditions of supervised release need not be orally pronounced, no such circumstances are present here. For example, when challenged modifications in the written judgment add "mere 'basic administrative requirements that are necessary to supervised release,'" we do not require pronouncement at sentencing. *Washington*, 904 F.3d at 208 (quoting *Rosario*, 386 F.3d at 169). We have also allowed for additions in the written judgment that merely "clarify the terms of the spoken sentence." *Id.* But we do not make such allowances where, as here, the modifications or additions impose new "burdensome punishments or

---

[2] We have previously suggested that a district court may orally pronounce supervised release conditions by "indicat[ing] that it [will] incorporate the conditions listed in the PSR." *United States v. Thomas*, 299 F.3d 150, 152 (2d Cir. 2002). But without delving into what specifically qualifies as sufficient for making a district court's intention to adopt the conditions recommended in the PSR clear to a defendant, we do not believe that the district court clearly indicated its intention to do so here.

restrictions," *Rosario*, 386 F.3d at 168, or where there is "a substantive discrepancy between the spoken and written versions of" the sentence, *Washington*, 904 F.3d at 208. As we explain, the seven additions at issue here should not have been imposed without having been orally pronounced.

For starters, the two written additions to Condition Three significantly restrict Rosado's movement and activity well beyond the pronounced condition's instruction that he is not permitted to have any deliberate contact with children without the permission of the Probation Office. These additions are neither clarifications nor necessary basic administrative requirements. Rather, they impose significant new restrictions on Rosado's liberty.

As to Condition Four, one challenged addition in the written judgment provides that Rosado shall "not utilize any peer-to-peer and/or file sharing applications without the prior approval of [his] probation officer." App'x at 40. The other requires Rosado to "allow the probation officer to conduct initial and periodic unannounced examinations of any Device(s) that are subject to monitoring." *Id.* These additions are not necessary administrative requirements for monitoring Rosado's computer activity. They are substantive add-ons that

do significantly more than clarify the version of Condition Four that was pronounced at sentencing.

As to Condition Six, the district court pronounced at sentencing that Rosado must "undergo a sex offense specific evaluation and participate in an outpatient sex offender treatment and/or outpatient mental health treatment program on the standard terms and conditions." App'x at 33. The government contends that the district court's statement at sentencing that Rosado must undergo treatment under the "standard terms and conditions" made clear that all of the requirements recommended in the PSR would be included in the written judgment. We are not persuaded. A reference to "standard terms and conditions"—even to the "standard terms and conditions" of a sex offender treatment program—would not notify a defendant and his counsel of the significant additional restrictions that subsequently appeared in Rosado's written judgment. For instance, such a reference would fail to apprise him that he would not be able to view legal adult pornography or access "websites" or "social networking sites"—which, by these broad terms, would include Google, LinkedIn, or WSJ.com—that his program found detrimental to his treatment. App'x at 40.

Moreover, a reference to "standard terms and conditions" does not make clear to a defendant that he would be required to undergo polygraph testing. In fact, this Court has already held that merely pronouncing that a defendant must participate in a sex offender treatment program does not obviate the need to specifically pronounce at sentencing that such treatment will include polygraph testing. *See Washington*, 904 F.3d at 206-08 (noting that polygraph testing is not a necessary or invariable part of sex-offender treatment). In sum, we are not persuaded that any of these unpronounced additions to Condition Six could be reasonably characterized as merely clarifying terms or basic administrative requirements.

Having found that the challenged additions to the written judgment should have been pronounced at sentencing, we turn to the question of the appropriate remedy. The government argues that we should remand to the district court for the limited purpose of orally pronouncing the challenged additions in Rosado's presence and giving Rosado an opportunity to object. *See* Appellee's Post-Argument Letter Br., *United States v. Rosado*, No. 22-1013, ECF No. 115 (Dec. 22, 2023). In some circumstances, we have granted this or a similar remedy, even though the typical rule is that unpronounced conditions must be

stricken from the judgment upon remand. *Compare United States v. Handakas*, 329 F.3d 115, 119 (2d Cir. 2003) *and United States v. DeMartino*, 112 F.3d 75, 81-82 (2d Cir. 1997) *with Washington*, 904 F.3d at 208; *Rosario*, 386 F.3d at 168; *and United States v. Jacques*, 321 F.3d 255, 263 (2d Cir. 2003).[3] However, the government advanced this argument for the first time at oral argument, despite Rosado arguing in his briefing that the unpronounced conditions should be stricken. Accordingly, we decline to now consider the government's request. *See, e.g.*, *United States v. Greer*, 285 F.3d 158, 170 (2d Cir. 2000) (declining to consider arguments not raised in parties' appellate briefs).[4] We, therefore, will not diverge from the typical practice of striking unpronounced conditions.

---

[3] *Cf. also United States v. Schultz*, 88 F.4th 1141, 1147 (5th Cir. 2023) ("Because the written judgment and oral pronouncement conflict, we REMAND to the district court to amend the written judgment to conform with the oral announcement."); *United States v. Martinez*, 250 F.3d 941, 942 (5th Cir. 2001) (per curiam) (remanding to amend written judgment to remove unannounced condition of supervised release).

[4] Moreover, the government fails to show that this is the kind of situation in which this Court has previously granted the remedy that it now seeks. *See, e.g.*, *Handakas*, 329 F.3d at 118-19 (remanding for pronouncement when the challenged condition had been previously properly imposed at the defendant's original sentencing); *DeMartino*, 112 F.3d at 81-82 (declining to conform the written judgment to the orally pronounced sentence where district court had failed to provide an adequate explanation for the sentence and where doing so would potentially result in sentencing error).

We recognize that this decision may, at first glance, appear to be overly formalistic, and striking conditions simply because they were not pronounced at sentencing may seem to be a somewhat drastic remedy. However, the requirement that a district court pronounce a sentence—including the conditions of supervised release—in the presence of a defendant is an important one. As we have observed, sentencing requires courts "to carefully balance the goals of supervised release while remaining mindful of the life-altering effects their judgments have on defendants, their families, and their communities." *Sims*, 92 F.4th at 120. There is rarely a more significant occasion for a defendant or his family than when his sentence is announced in open court. That occasion permits the defendant and counsel not only to hear the sentence, but also to object, to propose changes, or to seek clarification. That opportunity is lost if a defendant does not know what punishments and restrictions he will be subjected to until he later reads the written judgment. Consequently, the pronouncement requirement is not a mere formality; it is an essential component of the sentencing process.

CONCLUSION

For the reasons set forth above, we **VACATE and REMAND** to the district court with instructions to amend the written judgment to strike all of the challenged portions of Conditions Three, Four, and Six.[5]

[5] Because we conclude that the challenged portions of the conditions must be stricken, we need not reach Rosado's remaining arguments as to why these conditions were impermissible.

APPENDIX C - United States Court of Appeals Summary Order to affirm in povacate and remand the Sentence and Judgment in part on appeal (entered 7/30/24) Case No. 22-1013

For Appellee: DAMIAN WILLIAMS, *U.S. Attorney for the Southern District of New York*, New York, NY; JONATHAN L. BODANSKY, JANE Y. CHONG, STEPHEN J. RITCHIN, *on the brief*

For Defendant-Appellant: Steve Rosado, *pro se*

Appeal from a judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court as to Defendant-Appellant Steve Rosado's *pro se* challenges to his conviction is **AFFIRMED**.[1]

In November 2021, Rosado pled guilty pursuant to a plea agreement to (1) attempted enticement of a minor to engage in illegal sexual activity, in violation of 18 U.S.C. § 2422(b), and (2) attempted receipt of child pornography after having been convicted of sex offenses involving minors, in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1). Proceeding *pro se*, Rosado raises multiple challenges to his conviction.

[1] In a separate *per curiam* opinion filed concurrently with this summary order, we remand to the district court to amend Rosado's sentence.

22-1013-cr
United States v. Rosado

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of July, two thousand twenty-four.

PRESENT:

BARRINGTON D. PARKER,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,
Circuit Judges.

United States of America,

Appellee,

v. 22-1013-cr

Steve Rosado,

Defendant-Appellant

First, Rosado argues that during his plea colloquy, the district court violated Rule 11 by failing to explain the elements of 18 U.S.C. § 2422(b). We review this contention for plain error because no objection was raised before the district court. *See United States v. Pattee*, 820 F.3d 496, 505 (2d Cir. 2016). During the plea colloquy, the district court confirmed with Rosado that he had read the counts to which he was pleading, discussed them with his attorney, and understood them. At the district court's prompting, Rosado also described the conduct that established his guilt under 18 U.S.C. § 2422(b). On this record, Rosado has not shown that the district court committed plain error. *See Frederick v. Warden, Lewisburg Corr. Facility*, 308 F.3d 192, 197–98 (2d Cir. 2002).

Moreover, Rosado's contention that the district court failed to properly explain the elements of the § 2422(b) charge is based on his misunderstanding of controlling law. Rosado contends that the district court should have explained to him that simply persuading a proxy to allow him to have sex with a minor was insufficient to establish guilt for enticement. However, this Court has made clear that a defendant may "commit criminal enticement pursuant to § 2422(b) by communicating with a person he believed to be the adult guardian of a minor." *United States v. Douglas*, 626 F.3d 161, 165 (2d Cir. 2010); *see also id.* at 164 (noting

that "persuading a minor's adult guardian to lead a child to participate in sexual activity" may be a basis for liability).[2] There is no legal basis for Rosado's claim that he was entitled to receive his requested explanation from the district court.

Second, Rosado argues that a warrant the government secured in December 2020 to search his residence was not supported by probable cause and, consequently, that the evidence obtained pursuant to it should have been suppressed. We see no merit to this contention, and in any event, it is foreclosed by his guilty plea. It is well settled that a valid guilty plea forecloses a defendant's opportunity to challenge the admissibility of evidence obtained in violation of the Fourth Amendment. *See Class v. United States*, 583 U.S. 174, 182 (2018). Moreover, Rosado has not demonstrated the "good cause" necessary to excuse his failure to raise this issue before the district court. *United States v. Klump*, 536 F.3d 113, 120 (2d Cir. 2008) (quoting Fed. R. Crim. P. 12(c)(3)).

---

[2] To the extent Rosado claims that he cannot be criminally liable because he tried to persuade an adult proxy to let him have sexual relations with her children rather than persuade her to lead the children to have sexual relations with him, this is a distinction without a difference and has no merit. *Cf. United States v. Waqar*, 997 F.3d 481, 488 (2d Cir. 2021) (holding that "18 U.S.C. § 2422(b) imposes no requirement that an individual endeavor to 'transform or overcome' the will of his intended victim").

Third, Rosado argues ineffective assistance of counsel based on his attorney's failure to challenge the December 2020 warrant. We decline to address the merits of this claim because direct appeal generally is not the appropriate vehicle for doing so in the first instance. *See United States v. Khedr*, 343 F.3d 96, 99–100 (2d Cir. 2003). Such claims may be raised in a motion pursuant to 28 U.S.C. § 2255, especially when, as is the case here, the defendant "did not raise these contentions in the district court, [so] there is no record that would permit them to be assessed on this appeal." *United States v. Laurent*, 33 F.4th 63, 97 (2d Cir. 2022).

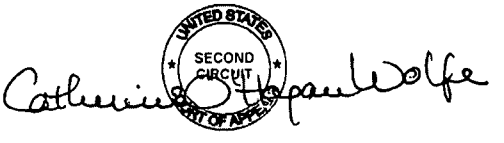
Fourth, Rosado challenges the district court's refusal to dismiss his initial indictment. Rosado argued in the district court that there was insufficient evidence to support a conviction under 18 U.S.C. § 2422(b). But that argument is now foreclosed by his guilty plea. *See United States v. Bastian*, 770 F.3d 212, 217 (2d Cir. 2014). Additionally, the district court properly dismissed Rosado's contention that the allegations in the initial indictment were insufficient as a matter of law. *See* Memorandum Order at 5–7, *United States v. Rosado*, No. 1:21CR00003 (S.D.N.Y. June 4, 2021), ECF No. 13. Rosado argued that his communications with the purported mother, rather than directly with the

minors, were inadequate to support a conviction under 18 U.S.C. § 2422(b), but as discussed above, this argument has no basis in our precedent regarding liability for enticement and was correctly rejected by the district court.

* * *

We have considered Rosado's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the district court's judgment with respect to Rosado's *pro se* challenges to his conviction.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX D - United States District Court for the S.D.N.Y. denying Motion to dismiss the Indictment (21-cr-03) (entered 6/4/21)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -against- STEVE ROSADO, Defendant.	21-cr-3 (JSR) MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Defendant Steve Rosado made electronic and telephonic contact between November 30 and December 7, 2020 with someone who, unbeknownst to him, was an undercover agent, in order to try to arrange to arrange sexual activity with two girls Rosado believed to be the agent's twelve- and nine-year-old daughters. Rosado then traveled to New York, NY to meet with the purported minors. A two-count indictment charges Rosado in Count One with attempted coercion and enticement, in violation of 18 U.S.C. § 2422(b) and 2, and in Count Two, with committing a felony offense involving a minor while being required to register as a sex offender, in violation of 18 U.S.C. § 2260A. Before the Court is Rosado's motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(2). Rosado argues that the prosecution's evidence and allegations cannot support a conviction under Count One, and that the commission of an offense that involves only a fictitious minor cannot support a conviction under Count Two. For the reasons that follow, the Court denies the motion.

LEGAL STANDARD

On a pretrial motion to dismiss an indictment, "the Court accepts the allegations in the indictment as true and focuses on the legal sufficiency of the indictment itself, without ruling on the legal sufficiency of the evidence or contrary assertions of fact." United States v. Rubin/Chambers, Dunhill Ins. Servs., 798 F. Supp. 2d 517, 522 (S.D.N.Y. 2011) (internal citations omitted); see also United States v. Alfonso, 143 F.3d 772, 776-77 (2d Cir. 1998); United States v. Goldberg, 756 F.2d 949, 950 (2d Cir. 1985). An indictment is sufficient when it "contains the elements of the offense charged," "fairly informs a defendant of the charge against which he must defend," and includes enough detail that the defendant "may plead double jeopardy in a future prosecution based on the same set of events." United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998) (internal citations and quotation marks omitted). The court may consider the sufficiency of the government's evidence on a pretrial motion to dismiss the indictment only when "the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial." United States v. Sampson, 898 F.3d 270, 282 (2d Cir. 2018) (quoting Alfonso, 143 F.3d at 777).

ANALYSIS

I. The Court denies the motion to dismiss Count One.

Count One of the Indictment alleges that between November 30 and December 7, 2020, in the Southern District of New York and elsewhere, Steve Rosado "using facilities and means of interstate and foreign commerce, unlawfully, willfully, and knowingly attempted to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years to engage in sexual activity for which a person can be charged with a criminal offense." Indictment, ECF No. 5, at ¶ 1. The indictment further alleges that Rosado "communicated by text, chat, and phone call with an undercover agent to arrange to engage in sexual activity with a purported twelve-year-old girl and a purported nine-year-old girl, and attempted to meet with the purported minors in New York, New York to engage in sexual activity." Id.

A. The Court may not weigh the sufficiency of the prosecution's evidence.

The defendant argues that Count One of the indictment should be dismissed, because there is insufficient proof "based on the closed universe of evidence that this case presents" that Rosado used the internet to attempt to persuade a minor to engage in sexual activity using means of interstate commerce in violation of 18 U.S.C. § 2242(b). First, Rosado argues that the evidence does not show that Rosado communicated directly with the purported

minors or passed messages, photos, or videos to the minors through the agent, and thus no enticement can have occurred. Second, Rosado argues that the evidence amounts to, at most, mere preparation to entice and not the "substantial step" required for attempt under 18 U.S.C. § 2. Third, Rosado argues that the evidence does not establish the use of a means of interstate commerce to persuade a minor to engage in sexual activity.

These arguments go to the sufficiency of the evidence and are inappropriate for pretrial resolution where, as here, the Government has not made a full proffer of the evidence it would put on at trial. See Sampson, 898 F.3d at 282. Though the defendant insists that this case presents a "closed universe of evidence" (whatever that may mean), there is no suggestion -- and the Government denies -- that the prosecution has made "a detailed presentation of the entirety of the evidence." See Alfonso, 143 F.3d at 776-77. Accordingly, the Court may address only the sufficiency of the Indictment on its face.

B. The Indictment is sufficient as a matter of law.

Rosado first argues that the facts alleged by the prosecution do not support a conviction for enticement under 18 U.S.C. § 2422(b), because Rosado allegedly conversed with the undercover agent posing as the minors' guardian, not with the minors themselves.

The argument that communications with an undercover agent posing as a minor's guardian cannot support an enticement conviction is foreclosed by Second Circuit precedent. Title 18 U.S.C. § 2422(b) criminalizes "an attempt to entice or an intent to entice, and not an intent to perform the sexual act following the persuasion." United States v. Brand, 467 F.3d 179, 201-02 (2d Cir. 2006). A defendant can "obtain or attempt[] to obtain a minor's assent to unlawful sexual activity" by communicating with a minor directly, or "by persuading a minor's adult guardian to lead a child to participate in sexual activity." United States v. Douglas, 626 F.3d 161, 164-65 (2d Cir. 2010). Thus, the allegations of the Indictment are sufficient to support Count One. See United States v. Wedd, 993 F.3d 104, 121 (2d Cir. 2021); United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992).

Rosado next argues that the prosecution's allegation that Rosado travelled to meet the purported minors cannot constitute a substantial step in an enticement case. To establish that Rosado is guilty of attempted enticement, "the government must prove that the defendant had the intent to commit the crime and engaged in conduct amounting to a 'substantial step' toward the commission of a crime." See United States v. Yousef, 327 F.3d 56, 134 (2d Cir. 2003). A substantial step goes beyond "mere preparation." United States v. Manley, 632 F.2d 978, 987-88 (2d Cir. 1980). A substantial step is an action "necessary to the consummation of

the crime . . . of such a nature that a reasonable observer, viewing it in context[,] could conclude beyond a reasonable doubt" that the defendant's actions were "undertaken in accordance with a design to violate the statute." Id. at 988.

Rosado argues that the crime of enticement is communicative in nature, and thus travelling to meet fictitious minors in New York can be, at most, mere preparation to entice the minors in person. However, the Second Circuit has repeatedly held that going to a prearranged meeting place can be a substantial step toward completing the crime of enticement. See, e.g., United States v. Brand, 467 F.3d 179, 204 (2d Cir. 2006) (finding that a defendant's "actions in attempting to set up a meeting with [a purported minor] further support the jury's finding that [defendant] attempted to entice a minor," and the defendant "took a 'substantial step' towards the completion of the crime because [the defendant] actually went to . . . the meeting place that he established with [the minor]"); United States v. Gagliardi, 506 F.3d 140, 150 (2d Cir. 2007) (finding "meritless" the argument that making arrangements to have sexual contact with a minor and then traveling to a designated meeting place is not a substantial step).

Finally, Rosado argues the alleged attempt to entice was not committed using a means of interstate commerce, because Rosado did not communicate with the minors online and instead planned to meet them face-to-face. However, the Indictment plainly alleges that

indirect enticement via the minors' purported guardian occurred by "using facilities and means of interstate and foreign commerce, . . . to wit, . . . text, chat, and phone call." Indictment ¶ 1.

The Indictment recites the elements of the offense, states the time and place the offense allegedly occurred, and offers enough detail that Rosado could plead double jeopardy if prosecuted again based on the same set of events. Moreover, as shown above, the Indictment alleges facts that, if proven, could constitute enticement in violation of 18 U.S.C. § 2422. Accordingly, the indictment is legally sufficient. See Hamling v. United States, 418 U.S. 87, 117 (1974); Stravroulakis, 952 F.2d at 693.

II. The Court denies the motion to dismiss Count Two.

Count Two of the Indictment alleges that between November 30 and December 7, 2020 in the Southern District of New York and elsewhere, Rosado "committed a felony offense involving a minor" under 18 U.S.C. § 2422 while being required to register as a sex offender. Indictment at ¶ 2.

Title 18 U.S.C. § 2260A criminalizes "commit[ting] a felony offense involving a minor under [inter alia] section . . . 2422" while "being required by Federal or other law to register as a sex offender." Section 2422, in turn, provides that a person who uses a means of interstate commerce to "knowingly persuade[], induce[], entice[], or coerce[]" an individual under eighteen to engage in unlawful sexual activity, "or attempts to do so," shall be fined

and imprisoned for at least ten years. 18 U.S.C. § 2422(b). The "attempt" language of section 2422 expands the statute's scope to encompass attempts to entice fictional minors. See Gagliardi, 506 F.3d at 147.

Rosado moves to dismiss Count Two on the ground that the section 2422(b) offense charged here does not involve an actual minor, and therefore Rosado cannot have "committed a felony offense involving a minor" under 18 U.S.C. § 2260A.

Section 2260A criminalizes the commission of felony offenses involving a minor, then enumerates sixteen such offenses. Some of those offenses, like kidnapping, do not always relate to minors, and in such circumstances, the phrase "involving a minor" further directs the reader to other provisions, such as the subsection on kidnapping children. See 18 U.S.C. § 1201(g). Unlike kidnapping or sex trafficking, section 2422(b) only "involves," that is, only applies to, a minor. Section 2422(b) criminalizes not only the completed crime of enticing a minor, but also any attempt to entice a minor. The case law is settled that a defendant can commit the offense of attempt under section 2422(b) even when no real minor is in danger, because the crime of attempted enticement "focus[es] on the subjective intent of the defendant, not the actual age of the victim." See Gagliardi, 506 F.3d at 147 (quoting United States v. Tyarsky, 446 F.3d 458, 466 (3d Cir. 2006)). Since "a violation of § 2422(b) does not require an actual minor due to its attempt

clause, neither does a violation of § 2260A require the involvement of an actual minor when that violation is predicated on a violation of § 2422." United States v. Slaughter, 708 F.3d 1208, 1215 (11th Cir. 2013) (internal citations omitted).

Further, when Congress has wanted to limit crimes and attempted crimes under this Chapter to offenses involving real children, Congress has clearly stated that the offense must involve "actual minors." See, e.g., 18 U.S.C. § 2252A (prohibiting possession of pornographic material depicting "actual minors"). If Congress intended to impose heightened penalties only for violations of section 2422(b) that involved "actual minors," as defendant suggests, Congress could have said so, but chose not to.

It remains only to add that the two Circuit Courts of Appeals to consider whether a violation of Section 2422(b) can be a predicate offense under section 2260A when no actual minor is involved have rejected defendant's arguments. See United States v. Fortner, 943 F.3d 1007, 1009-10 (6th Cir. 2019); Slaughter, 708 F.3d at 1215).

CONCLUSION

For the foregoing reasons, the defendant's pretrial motions to dismiss the Indictment are hereby denied.

SO ORDERED.

Dated: New York, NY
6-4-21

JED S. RAKOFF, U.S.D.J